

1 HONORABLE ROBERT J. BRYAN  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 JTH TAX LLC (d/b/a LIBERTY TAX  
11 SERVICE),

12 Plaintiff,

13 vs.

14 MARK KELLY,

15 Defendant.

Case No. 3:20-cv-05484-RJB

**ORDER GRANTING MOTION TO  
DISMISS COUNTERCLAIMS**

16 This matter comes before the court on Plaintiff JTH Tax LLC d/b/a Liberty Tax  
17 Service's ("Liberty") Motion to Dismiss Defendant's Counterclaims. Dkt. 30. The Court is  
18 familiar with the record related to the motion and the remaining record herein.

19                   **I.        FACTS**

20       In this case, Liberty alleges that the Defendant, Mark Kelly, a former franchisee,  
21 breached his franchise agreement with Liberty by operating a competing tax preparation  
22 business and using Liberty's federally registered trademarks, service marks, and logos after his  
23 franchised business was terminated. Dkt. 1. Liberty makes claims for violations of the  
24 Lanham Act, 15 U.S.C. §§ 1125(a) and 1125(c), the Defend Trade Secrets Act, 18 U.S.C.  
25 §1836, *et. seq.*, Washington Uniform Trade Secrets Act, RCW 19.108, *et. seq.*, breach of  
26 contract, breach of covenants not to compete or solicit, request for accounting, conversion,

1 unjust enrichment, and tortious interference with business relations. *Id.* Liberty requested  
2 damages, injunctive relief, attorneys' fees and costs. *Id.*

3 In his Answer to the Complaint, Defendant Kelly asserts counterclaims for violations  
4 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, violations of Washington's "franchise  
5 disclosure requirements" found at RCW 19.100.080, breach of contract, breach of the implied  
6 covenant of good faith and fair dealing, violations Washington's Franchise Investment Act,  
7 RCW 19.100.180, and violations of Washington's Unfair Businesses Practices Act, RCW  
8 19.86.020. Dkt. 24.

9 On August 19, 2020, the Court issued an order granting Liberty's Motion for a  
10 Temporary Restraining Order, which, by its terms, has now been converted to a Preliminary  
11 Injunction. Dkt. 33.

12 Now pending is Liberty's motion to dismiss Defendant Kelly's counterclaims. Dkt. 30.  
13 Kelly's response to the Motion to Dismiss was due on August 24, 2020. Kelly filed no  
14 response.

16 **II. DISCUSSION**

17 Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a  
18 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
19 theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990). Material  
20 allegations are taken as admitted and the complaint is construed in the plaintiff's favor.  
21 *Keniston v. Roberts*, 717 F.2d 1295 (9<sup>th</sup> Cir. 1983). "While a complaint attacked by a Rule  
22 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to  
23 provide the grounds of his entitlement to relief requires more than labels and conclusions, and  
24 a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v.*  
25 *Twombly*, 550 U.S. 544, 554-55 (2007) (internal citations omitted). "Factual allegations must  
26 be enough to raise a right to relief above the speculative level, on the assumption that all the

1 allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555. The complaint  
2 must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 547.  
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4 “Except for motions for summary judgment, if a party fails to file papers in opposition  
5 to a motion, such failure may be considered by the court as an admission that the motion has  
6 merit.” Local Rules W.D. Wash. LCR 7(b)(2). Here, the Court considers Defendant Kelly’s  
7 failure to file a response as an admission that the motion to dismiss has merit.  
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9 The Motion to Dismiss (Dkt. 30) should be granted. Liberty properly points out his  
10 Sherman Act claims should be dismissed because Defendant Kelly has failed to allege  
11 sufficient facts which would demonstrate that he has standing, has failed to adequately identify  
12 a relevant market, failed to plead which two products he alleges are “tied,” allege facts to  
13 support an assertion that Liberty had market power or monopoly power, or that Defendant  
14 Kelly suffered a cognizable antitrust injury.  
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16 Moreover, Liberty properly points out that Defendant Kelly’s franchise disclosure  
17 claim is time barred. As to Defendant Kelly’s breach of contract, Liberty’s argument, that  
18 Defendant Kelly fails to point to any provision of the contract Liberty is alleged to have  
19 breached, has merit. In regard to Defendant Kelly’s claim for breach of the implied covenant  
20 of good faith and fair dealing, Liberty’s argument the claim should be dismissed because  
21 Virginia (which is the law the parties agreed would apply to this contact) does not recognize  
22 such a claim, is well taken.  
23

24 Further, Liberty properly points out that Defendant Kelly’s claims for violations  
25 Washington’s Franchise Investment Act, RCW 19.100.180 should be dismissed because he  
26 failed to plead that Liberty’s purchasing requirements “substantially affect competition” as  
required under RCW 19.100.180(b) or that the sales complained of were from Liberty during  
Defendant Kelly’s time as a franchisee as required under RCW 19.100.180(d). Lastly, Liberty

properly points out that Defendant failed to plead that the actions by Liberty complained of affected the public interest as is necessary to state a claim for violations of Washington's Unfair Businesses Practices Act, RCW 19.86.020.

The motion should be granted and the counterclaims dismissed.

**III. ORDER**

It is **ORDERED** that:

- Plaintiff JTH Tax LLC d/b/a Liberty Tax Service's Motion to Dismiss Defendant's Counterclaims (Dkt. 30) **IS GRANTED**; and
- Defendant's counterclaims **ARE DISMISSED**.

DATED this 8<sup>th</sup> day of September, 2020.



ROBERT J. BRYAN  
United States District Judge